

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN B. FRATI,

Plaintiff,

v.

CITY AND COUNTY OF SAN
FRANCISCO DEPARTMENT OF PUBLIC
HEALTH and DIRECTOR DR.
GOLDENSON,

Defendants.

No. C 10-2686 LHK (PR)

ORDER OF DISMISSAL WITH
LEAVE TO AMEND

Plaintiff, a state prisoner proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against the City and County of San Francisco Department of Public Health and Director Dr. Goldenson. Plaintiff's motion for leave to proceed in forma pauperis is granted in a separate order. For the reasons stated below, the Court dismisses the complaint with leave to amend.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or

1 seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C.
 2 § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v.*
 3 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

4 To state a claim under 42 U.S.C. § 1983, Plaintiff must allege two essential elements: (1)
 5 that a right secured by the Constitution or laws of the United States was violated, and (2) that the
 6 alleged violation was committed by a person acting under the color of state law. *See West v.*
 7 *Atkins*, 487 U.S. 42, 48 (1988).

8 B. Plaintiff's Claims

9 According to the complaint, on April 26, 2010, Plaintiff suffered a fracture on his left
 10 hand when he arrived at San Francisco County Jail. Although he requested medical help and an
 11 x-ray, it appears he did not receive it. On May 10, 2010, a doctor recommended that the hand be
 12 broken again and re-set so that Plaintiff could obtain normal use of his hand. Plaintiff claims
 13 that the delay in medical treatment caused him great pain and resulted in a deformity in his hand.

14 In its current form, Plaintiff's complaint does not state a cognizable claim for relief. It
 15 appears that he is trying to allege that Defendants were deliberately indifferent to his medical
 16 needs, but he fails to support this claim with sufficient facts. A determination of "deliberate
 17 indifference" involves an examination of two elements: the seriousness of the prisoner's medical
 18 need and the nature of the defendant's response to that need. *See McGuckin v. Smith*, 974 F.2d
 19 1050, 1059 (9th Cir. 1992), *overruled on other grounds*, *WMX Technologies, Inc. v. Miller*, 104
 20 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A "serious" medical need exists if the failure to treat
 21 a prisoner's condition could result in further significant injury or the "unnecessary and wanton
 22 infliction of pain." *McGuckin*, 974 F.2d at 1059. And, a prison official is deliberately indifferent
 23 if he knows that a prisoner faces a substantial risk of serious harm and disregards that risk by
 24 failing to take reasonable steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
 25 Plaintiff should be aware that a claim of medical malpractice or negligence is insufficient to
 26 make out a violation of the Eighth Amendment. *See Toguchi v. Chung*, 391 F.3d 1051, 1060-61
 27 (9th Cir. 2004).

28 Because Plaintiff's complaint is insufficient to state a cognizable civil rights claim, he

1 must file an amended complaint that cures the deficiencies identified in this order if he can do so
2 in good faith.

3 First, the amended complaint must allege facts that show constitutional violations. The
4 amended complaint should describe what happened, when it happened, and how it violated his
5 constitutional rights. Although the amended complaint need not provide every specific detail of
6 the incident, the allegations need to be more detailed than that used in the original complaint.
7 For example, Plaintiff should explain how he requested medical aid; how many times he
8 requested medical aid; what response, if any, he received; and from whom. As the complaint
9 currently reads, the Court cannot determine whether Plaintiff has a cognizable claim for a
10 deliberate indifference to a serious medical need or any other constitutional violation.

11 Second, although the complaint names defendants, it does not link any defendant to the
12 allegations. In addition to providing factual information to show that constitutional violations
13 occurred (as discussed above), Plaintiff must allege in his amended complaint who caused those
14 constitutional violations. He needs to link each defendant to the claims by alleging facts
15 showing the basis for liability for each individual defendant. He should not refer to them as a
16 group (e.g., “the defendants” or “the medical staff”); rather, he should identify each involved
17 person by name and link each of them to the claim(s) by explaining what each defendant did or
18 failed to do that caused a violation of his constitutional rights. *See Leer v. Murphy*, 844 F.2d
19 628, 634 (9th Cir. 1988) (liability may be imposed on individual defendant under § 1983 only if
20 plaintiff can show that defendant proximately caused deprivation of federally protected right).

21 Third, Plaintiff names the City and County of San Francisco Department of Public Health
22 as a defendant. While local governments are “persons” subject to liability under 42 U.S.C.
23 § 1983 where official policy or custom causes a constitutional tort, *see Monell v. Dep’t. of Social*
24 *Servs.*, 436 U.S. 658, 690 (1978), a city or county may not be held vicariously liable for the
25 unconstitutional acts of its employees under the theory of respondeat superior, *see Board of*
26 *County Comm’rs v. Brown*, 520 U.S. 397, 403 (1997). Thus, to impose municipal liability under
27 § 1983 for a violation of constitutional rights, a plaintiff must show: (1) that he possessed a
28 constitutional right of which he or she was deprived; (2) that the municipality had a policy; (3)

1 that this policy amounts to deliberate indifference to the plaintiff's constitutional rights; and (4)
2 that the policy is the moving force behind the constitutional violation. *See Plumeau v. School*
3 *Dist. #40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). Plaintiff's complaint fails to
4 demonstrate any of these requirements.

5 Fourth, Plaintiff also names Director Dr. Goldenson as a defendant. Under no
6 circumstances is there liability under section 1983 solely because one is responsible for the
7 actions or omissions of another. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Absent
8 vicarious liability, each Government official, his or her title notwithstanding, is only liable for
9 his or her own misconduct." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). As stated above,
10 Plaintiff fails to link Goldenson to any constitutional violation.

11 CONCLUSION

12 For the foregoing reasons, the court hereby orders as follows:

- 13 1. The Court DISMISSES the complaint with leave to amend.
- 14 2. Plaintiff shall file an AMENDED COMPLAINT within **thirty days** from the date
15 this order is filed to cure the deficiencies described above if he can do so in good faith. The
16 amended complaint must include the caption and civil case number used in this order (C 10-2686
17 LHK (PR)) and the words AMENDED COMPLAINT on the first page. Plaintiff may not
18 incorporate material from the prior complaint by reference. **Failure to file an amended**
19 **complaint within thirty days and in accordance with this order will result in dismissal of**
20 **this action.**
- 21 3. Plaintiff is advised that an amended complaint supersedes the original complaint.
22 "[A] plaintiff waives all causes of action alleged in the original complaint which are not alleged
23 in the amended complaint." *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).
24 Defendants not named in an amended complaint are no longer defendants. *See Ferdik v.*
25 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).
- 26 4. It is the Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
27 Court informed of any change of address by filing a separate paper with the clerk headed "Notice
28 of Change of Address," and must comply with the Court's orders in a timely fashion. Failure to

1 do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule
2 of Civil Procedure 41(b).

3 IT IS SO ORDERED.

4 DATED: 10/12/2010



LUCY H. KOH
United States District Judge